Supreme Court, U.S.
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No. 90-1421

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

INDEPENDENT SCHOOL DISTRICT NO. 4 OF TULSA COUNTY, OKLAHOMA
Petitioner,

v.

NATALIE JOHNSON, BY AND THROUGH FRED AND JENNIFER JOHNSON, HER FATHER AND MOTHER, AS NEXT FRIENDS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENT

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COUNTER STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (FORMERLY TITLED THE EDUCATION FOR ALL HANDICAPPED CHILDREN'S ACT OF 1975), 20 U.S.C. §1400 - 1485 (1990), IS THE DETERMINATION OF WHETHER A QUALIFIED HANDICAPPED CHILD ELIGIBLE FOR AN EXTENDED SCHOOL YEAR BASED SOLELY ON A SINGLE CRITERION OF REGRESSION - RECOUPMENT, OR SHOULD A MULTIFACTED INQUIRY BE MADE?

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STATEMENT OF CASE

Natalie Johnson is a twelve (12) year old girl suffering from mental retardation, seizures, delayed speech, and autistic traits. She resides with her parents within the boundaries of the Petitioner, Independent School District No. 4 of Tulsa County, Oklahoma. Natalie attends public school at the Children's Developmental Center, a special education cooperative of which the School District is a member. Natalie is classified for special education purposes as a multi-handicapped student.

In September, 1987, an Administrative Due Process Hearing was

pursuant to 20 U.S.C. 1415 (b) (2) to consider a request by Natalie's parents for free extended school year special education program provided by the School District. At the Hearing, the parents presented testimony from a social worker involved with the family, and testimony from Natalie's mother. R. Vol. II, tr. at 58-85, 9-33. Documentary evidence was also presented in the form of written opinions from Natalie's pediatrician, neurologist, and licensed clinical psychologist. R. Vol. II. All agreed Natalie was in need of her structured special education program, and related therapies, during the summer months to prevent regression.

The Due Process Hearing Officer denied the family's request for summer services, stating that Natalie's educational record did not provide evidence of either regression or improvement during the summer. R. Vol. II, Hearing Decision, findings of fact 7, 8. The Hearing Officer's Decision was based on the factual finding no demonstration of actual regression during the summer was presented. The Hearing Officer also held that predictions of future regression are insufficient to require school districts to provide extended school year services to handicapped students.

The family appealed the decision, and the Appeal Officer affirmed the Hearing Officer's Decision, adopting the Hearing Officer's finding of fact. R. Vol. II, Appeal Review Decision.

Natalie's parents then appealed to the United States District Court for the Northern District of Oklahoma. No additional evidence was offered and the matter was referred to a Magistrate. The Magistrate's Report and Recommendation stated the preponderance of the evidence indicated Natalie could be predicted to regress during the summer unless her structured special education program was provided for her. The Magistrate further recommended that the School District be required to provide Natalie such a program.

The District Court disagreed, granting the School District's Motion for Summary Judgment, and denying Natalie's request for an extended school year. The District Court based its decision on the same regression standard used by the Administrative Officers.

Natalie's parents then appealed to the United States Court of

Appeals for the Tenth Circuit. The Court of Appeals reversed and remanded, holding the administrative record did not contain sufficient facts to allow an informed disposition of the case. The Court of Appeals further held those who conducted the Administrative Process, and the District Court, erred by converting what should have been multifacted inquiry into the application of a single, inflexible criterion of a regression - recoupment analysis. Petitioner's Appendix at 17a.

REASONS FOR DENYING THE WRIT

I. The Court of Appeals did not decide a Federal question which conflicts with the decisions of this Court.

The School District in its Petition for Writ of Certiorari claims the Court of Appeals issued an opinion contrary to this Court's decision in *Board of Education v. Rowley*, 458 U.S. 176 (1982), said contradiction by virtue of the supposed misapplication by the Court of Appeals of the two-pronged inquiry required under *Rowley*. The School District is required to provide Natalie with a free appropriate public education, 20 U.S.C. §1412(1). In *Rowley*, the Supreme Court held a state meets this requirement by providing personalized instruction with related services to allow a handicapped student the opportunity to benefit educationally from said instruction. *Rowley*, 458 U.S. at 203.

The Court further held that in any review of administrative decisions under 20 U.S.C. 1415(e)(2), a two-pronged inquiry must be had. First, has the state met the requirements of the procedures set forth in the *Individuals with Disabilities Education Act* (formerly the *Education for All Handicapped Children's Act*)? 20 U.S.C. §1400-1485 (1990). Second, is the student's educational program reasonably calculated to enable the child to receive educational benefits? *Rowley*, 458 U.S. at 206.

The procedures component of *Rowley* is not at issue. The make-up of the actual program for Natalie, whether it is reasonably

calculated to provide educational benefits, is at issue.

In holding that a multifacted inquiry must be made concerning the need for an extended school year, the Court of Appeals explicitly relied on *Rowley*. *Rowley* held that administrative and court reviews may not limit analysis of the appropriateness of a program to any single criterion. "We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act." 458 U.S. at 202. The single use of regression - recoupment as the standard for determining eligibility for an extended school year is exactly what *Rowley* instructs us not to do, the establishment of a single test to determine the adequacy of educational benefits. By holding that consideration of more than one criterion must be used, the Tenth Circuit follows this Court's requirement under *Rowley*.

The School District further attempts to rely on *Rettig v. Kent City School District*, 539 F.Supp. 768 (N.D. Ohio 1981), *aff'd in pertinent part and partial vacated on other grounds*, 720 F.2d 463 (6th Cir. 1983), *cert. denied*, 467 U.S. 1201 (1984). In *Rettig*, a regression standard was found to have been appropriately applied; however, it was held that "if on the basis of a multifactored evaluation, a new IEP for [the child] called for summer school," then the school must so provide (emphasis added). *Rettig* recognizes the requirements of *Rowley* to conduct an inquiry by means of more than a single test, thus the basis of "multifactored."

The Tenth Circuit, in following the requirements of *Rowley*, further relied on *Alamo Heights Independent School District v. State Board of Education*, 790 F.2d 1153 (5th Cir. 1986). In *Alamo Heights*, the Fifth Circuit explained the regression - recoupment analysis and found it to be an integral part in the process of determining eligibility for summer services. 790 F.2d at 1158. The Fifth Circuit goes on to hold:

> "The issue is whether the benefits accrued to the child during the regular school year will be significantly jeopardized if he is not provided an educational program during the summer months. This is, of course, a general standard,

> but it must be applied to the individual by [those drafting and approving the IEP] in the same way that juries apply other general legal standards such as negligence and reasonableness." 790 f.2d at 1158

Thus, *Alamo Heights* broadens the class of potentially eligible students for summer services. The Court of Appeals below further makes note that *Alamo Heights* found the child in question should receive a structured summer educational program, and that the case at bar resembles *Alamo Heights* in that testimony about the child's regression - recoupment was directly conflicting between the school employees and the parents' outside professional service providers.

The Court of Appeals discusses other court holding which consider many factors which may constitute an appropriate educational program under *Rowley*. The degree of impairment and the ability of the family to provide educational structure at home, *Battle v. Pennsylvania*, 629 F.2d 269 (3rd Cir.), *on remand*, 513 F.Supp 425 (E.D. Pa. 1980), *cert. denied*, 452 U.S. 968 (1981); the student's rate of progress, behavioral and physical problems, the availability of other resources, interaction with non-handicapped children, the areas of the child's curriculum which need continuous attention, and vocational needs, *Yaris v. Special School District*, 558 F.Supp. 545, 551 (E.D. Mo. 1983), *aff'd*, 728 F.2d 1055 *(8th Cir. 1984); and whether what is being sought is extraordinary to the child's condition, *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3rd Cir. 1988), *cert denied*, 109 S.Ct. 838 (1989). *Polk*, in fact, explicitly rejected the sole use of regression - recoupment to determine eligibility for summer services *Polk*, 853 F.2d at 184

II. The Court of Appeals did not decide an important question of Federal Law which has not been settled by this court.

As the School District's Petition for Writ of Certiorari states, the only question for decision is whether Natalie needs a structured extended school year program to receive educational benefits. The Court of Appeals held that because the administrative and court

reviews below focused so completely on only a single component of her education, regression - recoupment, there are insufficient facts to make an informed disposition of the case. Thus, the second prong of the *Rowley* inquiry, that of determining if the program is reasonably calculated to confer educational benefits, cannot be determined at this stage of the case. This Court's holding in *Rowley* that in reviewing decisions under the Act, both prongs of the inquiry must be satisfied, has not been met and the Court of Appeals was correct in reversing and remanding the case.

CONCLUSION

For the foregoing reasons, Respondent Natalie Johnson respectfully requests the judgement and order of the Court of Appeals below be affirmed, and further, that Petitioner's request for Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that three (3) true and correct copies of the above and foregoing **RESPONDENT'S BRIEF** was, on this 10th day of April 1991, mailed, postage pre-paid, to:

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